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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT**

(Yolo)

In re D.B. et al., Persons Coming Under
the Juvenile Court Law.

YOLO COUNTY DEPARTMENT OF SOCIAL
SERVICES,

Plaintiff and Respondent,

v.

V.B.,

Defendant and Appellant;

N.N.,

Movant and Appellant.

C043732

(Super.Ct.Nos. JV01-46
and JV01-47)

V.B., mother of the minors, and N.N., maternal aunt of the minors, appeal from orders of the juvenile court denying the maternal aunt's petition for modification and terminating parental rights. (Welf. & Inst. Code, §§ 366.26, 388; further undesignated statutory references are to the Welfare and Institutions Code.) The mother contends the court erred in terminating parental rights, because she had shown that it would be detrimental to sever the sibling bond. The maternal aunt contends the juvenile court erred in denying her petition for

modification without a hearing. We directed the parties to file supplemental briefing to address the form and legality of the court's order terminating parental rights. We reverse.

FACTS AND PROCEEDINGS

The Department of Social Services (DSS) removed the minors, D.B., age 3, and S.B., age 2, from the mother's custody in January 2001 and placed them in the maternal aunt's home. The mother failed to reunify and the juvenile court terminated her services in January 2002.

The minors did well placed with the maternal aunt and their behavioral problems resolved due to the structure she provided. Nonetheless, the minors did present ongoing challenges to the maternal aunt who, over time, wavered in her commitment to provide long-term care for them. About the time services were terminated, the maternal aunt faced several personal challenges including loss of employment and care of her seriously ill mother. As a result, she believed it would be best if the minors were adopted. Accordingly, she facilitated a lengthy transition to the prospective adoptive home where the minors were eventually placed in July 2002.

The DSS report of May 2002 for the section 366.26 hearing concluded that the minors were adoptable, noted the ongoing transition to the prospective adoptive home and recommended termination of parental rights. The court identified adoption as the permanent plan, without terminating parental rights, pending a successful transition to the prospective adoptive home.

In October 2002, DSS filed an addendum again recommending termination of parental rights. The purpose of the update was to provide information on the minors' progress in therapy and adjustment to placement and visitation with their maternal aunt and older half sister. The minors' therapist reported that the move to the prospective adoptive home caused the minors extreme stress in addition to their existing symptoms of Post Traumatic Stress Disorder (PTSD) and adjustment problems. However, both minors were showing signs of improvement. With therapy and the consistent commitment to the minors shown by the prospective adoptive parents both were sleeping better and their tantrums were more manageable. The structure in the prospective adoptive home had helped stabilize the minors.

The addendum further stated that when the minors were first placed, S.B. missed the maternal aunt and often cried for her, but over time as the bond with the prospective adoptive parents grew, she saw her current placement as home. S.B. continued to have conflicting feelings, viewing both the maternal aunt and the prospective adoptive mother as "Mommy." D.B. transitioned more easily and did not talk about returning to the maternal aunt's home. Overall, the move to the prospective adoptive home had gone well. The minors saw themselves staying in the home but also wanted visits with the maternal aunt; but when the time for visits was near, the minors grew "increasingly anxious" and started "acting out more than normal."

According to the addendum, the maternal aunt insisted on free access to the minors, despite the social worker's

explanation that they needed time to stabilize and bond with the prospective adoptive parents. The social worker noted that the mother was putting pressure on the maternal aunt to resume care of the minors. The maternal aunt continued to struggle with her decision to permit someone else to adopt the minors but did not say she wanted them returned to her. The social worker recommended the minors remain as placed.

At the section 366.26 hearing, the maternal aunt had decided she wanted the minors returned to her and wanted to adopt them. The court continued the matter and set a contested hearing.

In November 2002, the maternal aunt filed a petition for modification, seeking a bonding study or, alternatively, return of the minors to her care. She alleged that the circumstances had changed, because she was now employed and her mother was being cared for in a convalescent home. She also alleged that she was at that time committed to providing care for the minors and had felt pressured by the social worker to give them up to the prospective adoptive family. The maternal aunt further alleged that the minors were unhappy in their placement, that she perceived clear problems with the placement and that the minors repeatedly asked to come home.

In December 2002, the court granted the maternal aunt's request for a bonding study. The court recognized that if parental rights were terminated, the prospective adoptive parents would not be required to maintain contact with the minors' biological family and expressed concern about the bond of the

minors to their older half-sibling and the effect on the minors if the bond were severed.

The bonding assessment, filed in February 2003, addressed the bonds between the minors and the maternal aunt, the prospective adoptive parents and the half-sibling. The psychologist interviewed each of the individuals and observed interactions between the relevant participants. The maternal aunt, who lived alone and would rely on daycare, said the minors would have frequent contact with the half-sibling if they lived with her. She expressed concerns about the suitability of the prospective adoptive parents, blamed the mother for exposing the minors to violence and denied having done so herself. The prospective adoptive mother was concerned that D.B. had been left out of family interactions in his prior placement and that the focus had been on S.B. She believed the pattern would recur if the minors were returned to the maternal aunt and that D.B.'s needs were better met in her home. She acknowledged that S.B. had a more difficult adjustment to the prospective adoptive home and felt it was because she was more attached to the maternal aunt than was D.B. The prospective adoptive mother reported that both minors were improving, but both became more anxious before and after visitations. The 13-year-old half-sibling said she would like to see the minors more often and worried that they would move and she would not see them again. If the minors were returned to the maternal aunt, she intended to "devote a lot of her time to them" and stated that she "[wa]sn't interested in a social life." D.B. referred to the prospective adoptive parents

as mom and dad. He said that "if he were sad, he would go to his [prospective adoptive mom and dad] for comfort." He said he wanted to live with "mom" and "dad" and visit Ashley. At the evaluation, S.B. demanded attention and displayed provocative emotional behavior. The psychologist found that she was difficult to engage in conversation but she did identify the prospective adoptive parents as her parents although she wished the maternal aunt was her mother.

The psychologist concluded that both minors were bonded to the prospective adoptive parents but that S.B.'s bond was a more anxious attachment that showed insecurity and dependency. S.B.'s dependent behaviors indicated her fear of abandonment, most likely related to separation from the mother and then from the maternal aunt. S.B.'s strongest positive reaction was to her half-sister despite the lapse in time since their last visit. The psychologist stated that S.B.'s subsequent bonds would be insecure until she was able to develop a safe, trusting bond with a parental figure. She questioned whether that could happen with the maternal aunt because she had abandoned S.B. once. The psychologist was clear that S.B.'s bond with Ashley could not substitute for a parental bond and it would be unhealthy for Ashley to become a surrogate parent to S.B.. The psychologist found D.B. was more securely attached to the prospective adoptive parents than to the maternal aunt or Ashley and the emotional impact on him from termination of parental rights would be minimal.

As to the sibling relationship, the psychologist concluded that if the relationship with Ashley were severed, the minors would suffer a significant loss. As noted, the impact on D.B. would be minimal; however, S.B. would again feel rejected and abandoned but was likely to recover as her bond with the prospective adoptive parents deepened. Further, the nurturing and stable environment of the prospective adoptive home would mitigate the impact of the lost-sibling relationship.

In assessing possible return of the minors to the maternal aunt, the psychologist observed that the minors would need months of attention to recover from the move but that the maternal aunt, with limited time due to her employment and her necessary reliance on daycare, would be less likely to provide the required attention. In the psychologist's opinion, the minors would likely regress if returned to the maternal aunt, risking permanent emotional maladjustment and attachment disorder. D.B. was already attached to the prospective adoptive parents and S.B. currently was more attached to them than to the maternal aunt. The psychologist recommended no change in placement and a decrease in visitation until the minors' bond with the prospective adoptive parents was more secure.

Just prior to the hearing, DSS provided copies of a report by the minors' therapist, which reiterated her diagnosis that the minors suffered from PTSD. The report stated that B.D. recalled violence in the mother's home and specific violent incidents, including corporal punishment while living with the maternal aunt. According to the report, D.B. felt loved in his current

placement and the efforts of the prospective adoptive parents had led to improvement in his behavior. The therapist believed it would be detrimental to remove D.B. from the current placement. S.B. had also made progress in expressing her feelings and had become more assertive. She continued to have feelings of conflict and guilt about her relationship with the maternal aunt and the half-sibling. The therapist believed S.B. was at risk of developing "reactive attachment symptoms," if removed from her current home.

At the hearing on both the maternal aunt's petition for modification and the selection of a permanent plan, the maternal aunt acknowledged the new information before the court from the bonding study and the therapist's report but still sought a hearing on the petition for modification, arguing her own statement constituted prima facie evidence that would trigger a hearing. The court, without objection, considered not only the maternal aunt's declaration but also the information in the bonding study that she had requested and the therapist's report in ruling on her petition for modification. After reiterating the standard for granting a hearing on the petition, the court stated: "I can't say based on these reports it is in the best interest of these children to have a hearing. There isn't any basis. [¶] In fact all the information that was obtained for this hearing by [the maternal aunt] has done nothing other than present the information that was necessary for the Court to make a finding as I must. It would be against the best interest of the children to change their placement at this time. That I

would be doing possibly irreversible harm to them. [¶] Based on that, I cannot go forward with the [petition for modification.] The evidence is overwhelming that it would be against the best interest of these children to do so. So I don't know what else to say except that the [petition for modification] is denied based on the evidence presented by [the maternal aunt] which the Court has received in the record and admitted."

The mother then argued that the minors would suffer a significant loss if their bond with the half-sibling were severed and asked the court to select guardianship or long-term foster care as the appropriate permanent plan. The court was concerned about accommodating the sibling relationship under a permanent plan of adoption. Counsel for DSS pointed out that the sibling relationship did not outweigh the benefits to the minors of adoption, and in any case, the prospective adoptive parents intended to maintain the sibling relationship. The mother pointed out that there was no guarantee the sibling relationship would be preserved. Ultimately, the court adopted the recommended findings and orders, terminated parental rights and selected adoption as the permanent plan. The court stated: "And part of the understanding in adopting these findings and orders is that my understanding that the children's contact with the sister will be maintained, and that will be part of any plan of adoption, because that's in the best interest of the children, and the understanding which the Court has entered into this agreement with." The court also modified the proposed findings and orders to add, as both a finding and an order: "The

prospective adoptive parents agree to maintain contact with the sibling Ashley."

DISCUSSION

I

Hearing on Petition for Modification

The maternal aunt contends the juvenile court abused its discretion in denying her a hearing on her petition for modification.

As a "person having an interest in a child who is a dependent child of the juvenile court," the maternal aunt could bring a petition for modification of the order of the juvenile court pursuant to section 388 based on new evidence or on a showing of changed circumstances. (§ 388, subd. (a).)

Section 388 provides that "[a]ny parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of the court previously made or to terminate the jurisdiction of the court. . . . [§ 388, subd. (a).] [¶] If it appears that the best interests of the child may be promoted by the proposed change of order . . . or termination of jurisdiction, the court shall order that hearing be held [§ 388, subd. (c)]"

The individual "requesting the change of order has the burden of establishing that the change is justified. [Citation.]

The standard of proof is preponderance of the evidence." (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) Determination of a petition to modify is committed to the sound discretion of the juvenile court; absent a showing of a clear abuse of discretion, the decision of the juvenile court must be upheld. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319; see *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.)

The petition for modification must include facts showing a change in circumstances and that "the best interests of the child may be promoted by the proposed change in order." (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 672; *In re Edward H.* (1996) 43 Cal.App.4th 534, 593.) The petition can be denied without hearing only if it fails to make a prima facie showing of change of circumstances or new evidence that suggests the proposed change of order would promote the best interest of the child. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1414; Cal. Rules of Court, rule 1432(b).) More than general conclusory allegations are required to make this showing even when the petition is construed liberally. (*In re Edward H.*, *supra*, 43 Cal.App.4th at p. 593.) "The prima facie requirement is not met unless the facts alleged, if supported by evidence . . . would sustain a favorable decision on the petition." (*In re Zachary G.*, *supra*, at p. 806.)

Arguably, the allegations of the original petition for modification (relying solely on the declaration of the maternal aunt) could have justified an order for a hearing on the petition. However, by the time the court ruled, it had already

granted part of the petition for modification by ordering a bonding study. Without objection, the court considered the bonding study and the therapist's report along with the maternal aunt's declaration as the factual basis to determine whether to hold a hearing. Sifting through the evidence and discarding any conflicting information about the minors' experiences while living at the maternal aunt's home, the court was left with the conclusions of the bonding study, i.e., that D.B. was bonded to the prospective adoptive parents but had little connection with the maternal aunt and that S.B., while still attached to the maternal aunt, was more attached to the prospective adoptive parents and risked developing reactive attachment symptoms if she were moved. The totality of this evidence could not have sustained a favorable decision because the information in the bonding study unequivocally led to the conclusion that changing the minors' placement was not in their best interests. The juvenile court did not abuse its discretion in denying the petition for modification without further hearing.

II

Termination detrimental to the minors

The mother contends the evidence showed that termination of parental rights would be detrimental to the minors because it would substantially interfere with their relationship with their half-sibling.

At the section 366.26 hearing, "[i]f the court finds the child is adoptable, it *must* terminate parental rights absent circumstances under which it would be detrimental to the child."

(*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368.) There are only limited circumstances that permit the court to find a "compelling reason for determining that termination [of parental rights] would be detrimental to the child" (§ 366.26, subd. (c)(1).)

One of the circumstances under which termination of parental rights would be detrimental is when "[t]here would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." (§ 366.26, subd. (c)(1)(E).)

The juvenile court was very concerned that the sibling relationship be maintained. The court stated it was terminating parental rights with the "understanding that the children's contact with the sister will be maintained, and that will be part of any plan of adoption . . . , and the understanding, which the Court has entered into this agreement with."

After reviewing the record, which included the court's modifications to the findings and orders noted previously, we requested supplemental briefing on whether the court conditioned the order terminating parental rights on its understanding that sibling contact would be maintained and that the prospective

adoptive parents agreed to maintain the contact. The parties have responded with divergent views. The maternal aunt argues that the order was conditional; DSS and the mother assert that it was not. Both DSS and the mother point out that the court was aware that such an order was not enforceable and that the court's language and modification of the recommended findings and orders was nothing more than an expression of the court's hope that contact would be maintained and that the prospective adoptive parents would enter into a postadoption contact agreement pursuant to section 366.29.

It is clear from the record that the juvenile court understood that *once adoption occurred*, the court would not be able to compel the prospective adoptive parents to maintain contact with the remaining sibling. But, from the court's statements and modification of the findings and orders, it appears that the juvenile court may have conditioned termination on the willingness of the prospective adoptive parent to maintain sibling contact.

All the parties agree that the juvenile court could not enter such an order. If the court, at the section 366.26 hearing, finds that the minors are likely to be adopted, it must *either* terminate parental rights *or* make appropriate findings that termination would be detrimental to the minor for one of the circumstances enumerated in section 366.26, subdivision (c)(1). Here, the court did neither. Instead, the court adopted ambiguous findings and orders. Because we cannot determine from this record whether or not the court found on the conflicting

evidence that the sibling exception to termination applied, reversal is required.

DISPOSITION

The orders of the juvenile court terminating parental rights are reversed. The juvenile court is directed to make a determination, based on the evidence presented at the section 366.26 hearing, whether the sibling exception set forth in section 366.26 subdivision (c)(1)(E) has been established and thus whether termination of parental rights would be detrimental to the minors and to enter new orders in accord with its findings.

HULL, J.

We concur:

SIMS, Acting P.J.

DAVIS, J.